IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7640 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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LALITABEN WD/O BALDEVBHAI MANIBHAI SUTHAR-Petitioner(s)
Versus
NIRUBEN RAMANBHAI SUTHAR & 2 - Respondent(s)

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Appearance :
MR BG PATEL for Petitioner(s) : 1,
None for Respondent(s) : 1,
MR YATIN SONI for Respondent(s) : 1.2.1, 1.2.2,1.2.3
RULE SERVED BY DS for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 11/01/2007

ORAL JUDGMENT

1. Mr.B.G. Patel, learned counsel for the petitioner, Mr.Yatin Soni, learned counsel for the respondent Nos.1/1 to 1/3, Mr.A.Y. Kogje learned Assistant Government Pleader for

the respondent Nos.2 and 3 – State.

2. By the present writ application, petitioner seeks to challenge the order dtd.29/8/1992 passed by the Deputy Collector in RTS Appeal No.53 of 1992, order dtd.24/2/1993 passed by the Collector in RTS Revision No.91 of 1992 and order dtd.23/5/1995 passed by the Secretary, Revenue Department in Case No.SRD/B/HKP/43 of 1993.

3. The undisputed facts are that one Manibhai Hargovandas Suthar owned and possessed land bearing Survey Nos.307, 308, 302 and 375 which were made a Block, numbered as No.723, after coming into force Consolidation Act at village Khadana. The said Manibhai Hargovandas Suthar died on 15/8/1947 and was survived by his son – Baldevbhai Manibhai Suthar and minor daughter Shantaben. On an application-cum-information given by Baldevbhai Manibhai Suthar to the Talati-cum-Mantri, Mutation Entry No.2192 was made in favour of said Baldevbhai on 18/2/1948, undisputedly, the entry was certified.

4. Baldevbhai Manibhai Suthar died on 8/4/1990 leaving behind the present petitioner - Lalitaben, as his widow. On an information and application by her, her name was

mutated in the record of rights vide Mutation Entry No.958 on 15/2/1991 and the said entry was certified by the competent authority on 9/8/1991. After the said entry was certified, it appears that Shantaben sister of Baldevbhai and daughter of Manibhai either made some application to Talati-cum-Mantri or informed him that she was also entitled to mutation of her name, as she happened to be daughter of Manibhai Hargovandas Suthar. She also informed the Talati-cum-Mantri that the property was joint family property and under the Hindu Law, she could succeed to the father's property. On submission of Shantaben, Entry No.1062 came to be made in favour of said Shantaben. The said entry was challenged by the petitioner before the Mamlatdar and Agricultural Lands Tribunal (“ALT” for short), who, after hearing the parties, held that Shantaben, who had not raised any objection against Mutation Entry Nos.958 and 2192 was not entitled to raise any objection. Shantaben, being aggrieved by the said order passed by the Mamlatdar and ALT, filed the RTS Appeal No.53 of 1992 in the Court of Deputy Collector, who, allowed the same and directed mutation of the name of Shantaben in the record of rights. As the revisions preferred to the

Collector and Gujarat Revenue Tribunal proved futile, the petitioner is before this Court.

5. Mr.Patel, learned counsel for the petitioner submits that in the present case, on the death of Manibhai, the succession opened in the year 1947. If that is the true factual position, the legal position would be that in the year 1947, the daughter would not be entitled to succeed to anything. His submission is that before coming into force of Hindu Succession Act, 1956, specially Sec.6 or Sec.8of the said Act, daughter was not entitled to any share in the property. His further submission is that the old, orthodox Hindu law clearly provided that a daughter would only be entitled to maintenance and nothing more and in case some property is given in possession of a female and she continues to be in possession upto the date when the Hindu Succession Act came into force, such person then only would become owner of the property. His submission is that in the year 1990 when Baldevbhai died, under sec.8 of the Hindu Succession Act, sister would not be a successor-cum-heir of the brother, if the sons, daughters and/or widow of the deceased survived the deceased. He submits that the entry made in favour of Shantaben is per-se illegal.

6. Mr.Yatin Soni, learned counsel for Shantaben's legal representatives submits that Baldevbhai made misrepresentation in the year 1947/48 and did not bring correct picture to the notice of the Talati-cum-Mantri that deceased Manibhai Hargovandas Suthar was survived by Baldevbhai and Shantaben. He submits that the entry made in favour of Baldevbhai, would enure to the benefit of the present respondent Shantaben and in any case, on death of Baldevbhai, respondent Shantaben was entitled to get her name entered in the record of rights. He also submits that when a submission is made to the Talati-cum-Mantri for mutation, it is not expected of such authority to make an inquiry into the legal niceties relating to succession and in case, he is of the prima facie opinion that the person making the application could be taken to be a successor, then, the Talati-cum-Mantri would be entitled to make such an entry. The submission of Mr.Soni, learned counsel is that on death of Baldevbhai, Shantaben was entitled to her mutation being successor of Manibhai Hargovandas Suthar.

7. Before coming into force of Hindu Succession Act, 1956, succession amongst Hindu was governed by Sruti, Smruti and orthodox Hindu Law. Mansmruti was the source to

provide that what would be the mode of succession. Mitakshara or Banaras law, Daybhag or Bengal Hindu Law were also to govern the succession. In Gujarat, succession could be governed by Mayukha School of Hindu Law. In each of the laws, daughter or widow of the deceased was not entitled to succession to the property left by the last male holder, be he a Karta of Joint Hindu Family or owner in his personal capacity. Mayukh Hindu Law which governs a part of Gujarat, talks of the Matiarchiel family and right of the woman in property, but to appreciate that the parties are governed by Mayukh law and the daughter or female would be entitled to succeed to the property, such evidence is required to be brought on record by the person who claims succession through her father.

8. In the present matter, on the death of Manibhai right to succeed to the property opened in the year 1947. It is trite to say that succession never remains in abeyance and on the death of last holder or the owner, it immediately opens and the property flows in favour of those who are entitled to succeed to the property under the law governing the field at the material time. In the year 1947, when the succession opened, daughter had no

right in the property.

9. A person who was offered the property towards the maintenance, if was in possession and continued to be in possession till coming into force of the Hindu Succession Act, would become absolute owner of the property under sec.14 of the Hindu Succession Act. A person who simply had a right of maintenance, but was not given any property, would not be entitled to a partition of property after coming into force of the Hindu Succession Act, because, succession had already opened much before coming into force of the Hindu Succession Act. Hindu Succession Act, in fact, conferred rights in favour of those who had no right in the property, the Act did not revive the lost rights nor is retrospective in operation. Hindu Succession Act was simple to crystallize and codify the Hindu Law relating to succession. For the first time under the codified law, right was conferred upon widow, daughter, widow of the predeceased son and other females, who, otherwise, had no right in the property before coming into force of the Hindu Succession Act.

10. Sec.6 of the Hindu Succession Act provides that in case there is a Joint Hindu Family Property, the property would be succeeded by other co-parceners of the family and

they would enjoy the joint possession over the same. Clause (b) of sec.6 of Hindu Succession Act provides that if a co-parcener-cum-owner in the Joint Hindu Family leaves any female heir as provided under sec.8 of the Act, then, there would be a deemed partition and the property would devolved upon by succession and not by survivorship. Sec.6 would govern the field of succession after coming into force of Hindu Succession Act and would not reopen the subject which already came to an end.

11. Sec.8 of the Hindu Succession Act provides natural course of succession, it provides different heads and different class of the successors-cum-heirs. Widow or widow of a predeceased son would be Class-I heir while, sister would be Class-III heir.

12. In the present case, in the year 1947 Shantaben did not and could not succeed to the property being daughter of the deceased Manibhai Hargovandas Suthar and in the year 1990 when the succession again opened on death of Baldevbhai, she being the sister could not succeed to the property under sec.8 of the Hindu Succession Act. If this would be the correct legal position, she would not be entitled to make an application to the Talati-cum-Mantri

for mutation of her name in the record of rights.

13. It would be fallacy of law to say that the mutation of name of Baldevbhai would enure to the benefit to Shantaben who happened to be minor in the year 1947. One could understand the argument, if Shantaben was to succeed to the property of her father and on her father's death, her guardian did not make an application for mutation of her name. Even in such a case, such person within three years of attaining the majority, was required to file a suit before the competent court for declaration of the rights and partition of the property.

14. In the present case, Shantaben did not succeed to the property either in the year 1947 or in the year 1990, therefore, she could not make any application to the Talati-cum-Mantri for mutation of her name in the record of rights.

15. The argument of Mr.Soni learned counsel that the Talati-cum-Mantri is not required to decide who are the successors, can straightway be rejected being misconceived. For mutation of ones name, one has to satisfy the authority that they have some right in presentee and under the circumstances, they are entitled to an order of mutation in their favour.

16.The legal position, as detailed above, has not been properly appreciated by the revenue authorities, their judgments are not legal judgments and it appears that they were swayed away by the fact that Shantaben was a minor daughter. They did not understand that if the daughter was not entitled to succeed to the property, then, at any time no rights would accrue in her favour in the property.

17.The impugned orders more particularly order dtd.29/8/1992 passed by the Deputy Collector in RTS Appeal No.53 of 1992, order dtd.24/2/1993 passed by the Collector in RTS Revision No.91 of 1992 and order dtd.23/5/1995 passed by the Secretary, Revenue Department in Case No.SRD/B/HKP/43 of 1993, are hereby set aside. Consequently, Mutation Entry No.1062 made by the Mamlatdar-cum-Secretary in the record of rights is also quashed. Rule is made absolute. The petition is allowed with cost which is quantified at Rs.2000.00 (Rupees Two Thousand only). The cost shall be paid by the respondent Nos.1/1 to 1/3 to the petitioner.

(R.S. GARG, J.)

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